

# **HOUSE BILL ANALYSIS**

## **HB 1032**

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***Background:*** In 1994 and 1995, the Legislature made substantial changes to agency rule-making and the legislative review of rules. Last session, the Legislature again considered, but did not pass, additional changes to rule-making and rules review. A work group looked specifically at the issue of agency use of interpretive and policy statements during the 1996 interim.

***Grants of Rule-Making Authority:*** ESHB 1010 as passed by the Legislature during the 1995 session prohibited the departments of Labor and Industries, Revenue, Ecology, Social and Health Services, Health, Licensing, Employment Security, and Agriculture, as well as the Fish and Wildlife Commission, the Forest Practices Board, the Commissioner of Public Lands, and the Insurance Commissioner from relying solely on intent statements or the agency's enabling provisions as statutory authority to adopt a rule. All other agencies were prohibited from adopting rules based solely on intent statutes or enabling provisions when implementing future statutes, except to interpret ambiguities in a statute. The Governor vetoed the sections pertaining to the Forest Practices Board, the Department of Labor and Industries, and the Insurance Commissioner.

### ***Rule-Making Requirements.***

***What constitutes a rule.*** The state Administrative Procedure Act (APA) details procedures that state agencies are required to follow when adopting rules. Generally, a rule— is any agency order, directive, or regulation of general applicability which (a) subjects a person to a sanction, if violated; or (b) establishes or changes any procedure or qualification relating to agency hearings; benefits or privileges conferred by law; licenses to pursue any commercial activity, trade, or profession; or standards for the sale or distribution of products or materials. Before adopting a rule, an agency must follow specified procedures, including publishing notice in the state register and holding a hearing.

***Interpretive and policy statements and other agency issuances.*** In addition to rules, agencies also issue other types of documents. An interpretive statement— is a document titled an interpretive statement that states an agency's opinion as to the meaning of a statute. A policy statement— is a document titled a policy statement that states an agency's current approach to implementation of a statute. Interpretive and policy statements are advisory only. Agencies must send copies of interpretive and policy statement to persons who request to be on a roster and must send a description of the subject matter of the statement to the Code Reviser for publication in the register. Agencies are encouraged to convert long standing interpretive and policy statements into rules and procedures are set forth for persons to petition agencies to request such conversions.

*Other types of issuances include consumer-related guides and brochures, technical assistance documents and tax determinations issued by the Department of Revenue. A tax determination is the Department's decision regarding the applicability of the law to a particular taxpayer. The Department of Revenue may determine that a determination has precedential value for other taxpayers.*

*Emergency rules. An agency may adopt an emergency rule if for good cause it finds that either: (1) the immediate adoption, amendment, or repeal of a rule is necessary for the preservation of the public health, safety, or general welfare, and that it would be contrary to the public interest to observe the time requirements of public notice and opportunity to comment; or (2) that state law, or a federal law, rule, or deadline for receipt of funds requires immediate adoption of a rule. The agency must include a statement of the reasons for the emergency in the rule adoption order filed with the Code Reviser. An emergency rule takes effect upon filing. No additional notice or a hearing is required.*

*Significant legislative rules. Before adopting significant legislative rules, the departments of Labor and Industries, Revenue, Ecology, Health, Employment Security, and Natural Resources, as well as the Forest Practices Board and the Insurance Commissioner must make certain determinations. The Department of Fish and Wildlife must also make these determinations when adopting certain hydraulics rules. Additionally, the Joint Administrative Rules Review Committee (JARRC) may also require that any state agency rule be subject to these determinations.*

*These determinations include that the probable benefits exceed the probable costs, that the rule does not require persons to take an action that violates another federal or state law, and other determinations. The identified agencies must place in the rule-making file sufficient documentation to justify the determinations and a rule implementation plan. The agency must also coordinate implementation and enforcement of the rule with other federal and state entities regulating the same activity or subject matter. Certain rules, including emergency rules, procedural and interpretive rules, and other types of rules are exempt from this determination process.*

*Other rule-making provisions. Agencies must send notice to interested persons of rule-making activity. No provision is made for agencies to use electronic mail or facsimile mail in lieu of regular mail. In addition, agencies are not able to make filings with the Code Reviser by electronic mail.*

*Rules remain in effect until amended or repealed. The APA does not require state agencies to review their rules. An expedited repeal process allows agencies to repeal rules through a simplified process if no one objects. Agencies must annually identify rules that should be repealed by the expedited process.*

**Legislative Review of Rules.** *JARRC has authority to selectively review rules and interpretive and policy statements. If JARRC find that a rule is not within the intent of the legislature or has not been adopted in accordance with all provisions of law, or that an agency is using an interpretive or policy statement in place of a rule, JARRC notifies the agency. A process is established for the agency to respond to JARRC's finding and for JARRC to take further steps. Ultimately, JARRC may recommend that the Governor suspend a rule.*

*The procedures for legislative review of rules do not establish a presumption as to the legality or constitutionality of the rule in subsequent judicial proceedings. In the last two legislative sessions, the Governor has vetoed provisions which would have provided that a JARRC suspension recommendation on the ground that a rule does not conform with the intent of the legislature establishes a rebuttable presumption that the rule is invalid. In these cases, the agency has the burden of demonstrating the validity of the rule.*

**Judicial Review of Rules.** *The burden of proof for demonstrating the invalidity of an agency action, including the invalidity of a rule, is generally on the person asserting its invalidity.*

*A court is required to award fees and other expenses, including reasonable attorneys' fees, to a qualified party who prevails against a state agency in a challenge of an agency action, unless the court finds that the agency action was substantially justified or that circumstances would make an award unjust. The amount awarded may not exceed \$25,000. The court may reduce the award to the extent that a qualified party unduly or unreasonably protracted the final resolution of the matter. The law does not address the awarding of fees and other expenses if the agency appeals the Superior Court decision.*

**Adjudicative Proceedings.** *Whenever a state agency conducts a hearing which is not presided over by officials who are to render the final decision, the hearing shall be conducted by an administrative law judge.*

**Regulatory Impact Notes:** *The Office of Financial Management (OFM) acts as the coordinating entity for the preparation of fiscal notes by state agencies. Fiscal notes show the expected increase or decrease of state revenues or expenditures by proposed legislation. Fiscal notes do not show the impact that proposed legislation might have on businesses.*

**Summary:**

**Grants of Rule-Making Authority:** *The Forest Practices Board, the Department of Labor and Industries, and the Insurance Commissioner are prohibited from relying solely on intent statements or the agency's enabling provisions as statutory authority to*

*adopt a rule. The Insurance Commissioner may use enabling/intent provisions to adopt procedural or interpretive rules. The prohibition relating to the Department of Labor and Industries does not apply to prevailing wage rules.*

**Rule-Making Requirements.**

*What constitutes a rule. The definition of rule– is expanded to include statements, in addition to directives, orders and regulations.*

*Interpretive and policy statements and other types of agency issuances. The definitions of interpretive and policy statements are revised and clarified. A statement which falls within the definition is covered whether or not it is entitled an interpretive or policy statement. Interpretive and policy statements are for general application by the agency for the purpose of providing guidance to persons as to their obligations under the law. Consumer-related guides and brochures, technical assistance documents, and tax determinations issued by the Department of Revenue are excluded. Clarifying language is added that interpretive and policy statements do not foreclose alternative courses of action by persons in agency actions and may not be used to substantially modify existing rules. Agencies may not use interpretive and policy statements, guidelines, or other issuances in a binding manner against any person. If a court or presiding officer finds that an agency is applying an agency issuance in a binding manner, then the issuance is invalid because it constitutes a rule which was not properly adopted.*

*Persons may petition agencies to repeal or withdraw interpretive and policy statements in addition to requesting their conversion into rules. Agencies are not required to send notice of interpretive and policy statements which concern only internal agency procedures that do not affect private rights or procedures available to the public.*

*The Department of Revenue must index tax determinations which are precedential and publish the determinations and indexes.*

*Emergency rules. The authority to adopt emergency rules based on the preservation of general welfare is repealed. The Department of Agriculture, however, may adopt an emergency rule if the failure to do so would result in substantial reduction of commodity value or substantial economic detriment.*

*Significant legislative rules. The Department of Social and Health Services is added to the list of agencies required to follow the procedures for significant legislative rules.*

*Other rule-making provisions. No rule adopted by the Departments of Ecology, Employment Security, Labor and Industries, Revenue, Licensing, Health, Social and Health Services, Fish and Wildlife or the Insurance Commissioner is effective for more than seven years after its adoption, or the effective date of this legislation, whichever is*

*later. The affected agencies are directed to review their existing rules on a specified schedule.*

*An expedited adoption process is established which is similar to the expedited repeal process. Agencies may use the procedure to convert interpretive and policy statements into rules and for rules which are being readopted following a review. The expedited repeal procedure is modified to require agencies to identify rules twice a year for expedited repeal.*

*Each agency must prepare a semiannual agenda for rules under development. The agency must send a copy to interested persons and publish it in the register.*

*An agency may send notices relating to rule making by electronic or facsimile mail when requested in writing by the person receiving the notice.*

*The statute law committee is directed to convene a working group of representatives from OFM, state agencies and the public to develop proposed rules relating to agency electronic filing of rules and for allowing more information to be published in the register, and to develop a method for noting in the statutes or codes when interpretive or policy statements have been issued.*

*An agency which has rules that delay full compliance with their provisions beyond 90 days after this act's effective date must prepare a small business economic impact statement on those rules before full compliance can be required.*

#### *Legislative Review of Rules.*

*JARRC may review interpretive and policy statements, guidelines and other issuances to determine whether an issuance constitutes a rule. If JARRC finds that the issuance is a rule, the committee may also examine whether the rule is within legislative intent. JARRC may recommend suspension of an interpretive or policy statement which is a rule. A person may petition JARRC to review guidelines and other issuances of general applicability.*

*A JARRC suspension recommendation to the Governor that a rule be suspended because it does not conform with legislative intent or was not adopted in accordance with law establishes a rebuttable presumption in any proceeding challenging the rule that the rule is invalid. In these cases, the agency has the burden of demonstrating the validity of the rule.*

#### *Judicial review.*

*In a declaratory judgment action challenging the validity of a rule, the burden of going forward with the evidence is on the agency.*

*In a proceeding involving the review of an interpretive or policy statement, the deference the court may give to the agency interpretation depends on a number of factors, including whether the statute was issued contemporaneously with the passage of the statute to which it relates and whether the agency had historically ever interpreted the statute to require the standards in the statement.*

*If an agency appeals a decision of the superior court, the agency must pay the subsequent fees and other expenses incurred by the qualified parties that prevailed in Superior Court. The agency must pay the fees and other expenses from its appropriation for administration and support services and not out of any funds for program activities or service delivery. The amount awarded to a qualified party for an appeal may not exceed \$25,000.*

*Adjudicative Proceedings. A hearing held by the Insurance Commissioner must be conducted by an administrative law judge unless the person demanding the hearing agrees in writing to have an employee of the commissioner conduct the hearing.*

*An agency rule which requires a presiding officer to apply agency rules as the first source of law is invalid.*

*Regulatory Impact Notes: OFM is required to establish a procedure to provide regulatory impact notes on bills and resolutions that affect business. OFM is directed to act as the coordinating body for the development of these notes by state agencies. The notes must show the expected impact of bills and resolutions that increase or decrease regulations on the operation of businesses subject to the state business and occupation tax.*

*A regulatory impact note must be prepared on the basis of a sampling of businesses that are regulated by the legislation. The note must contain an estimate of the fiscal impact to the affected business for the biennium in which the legislation will take effect as well as the fiscal impact for the succeeding two fiscal years.*

*Copies of regulatory impact notes must be filed with the House and Senate fiscal committees and the chair of the committee to which the legislation was referred upon introduction. Copies of the notes must also be placed in the bill books or otherwise attached to the legislation and accompany the legislation throughout the legislative process. OFM must also provide a regulatory impact note at the request of a legislator on proposed legislation.*

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